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Richard D. Sommers

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## THE REGULATION OF VENDOR CREDIT: INCONSISTENCIES IN CALIFORNIA LAW

Reliance upon credit for the acquisition of consumer goods and services has become an important factor in our economy. Paralleling the increase and diversity of consumer credit, there has been an increase and diversity in abusive practices.<sup>1</sup> Furthermore, it has been recognized that some laws which have been applied to consumer credit transactions are inappropriate to the requirements of contemporary conditions.<sup>2</sup> In response to these abuses and anachronisms, state and federal legislatures have enacted a variety of laws designed to inform and protect the consumer. The focus of this Comment will be upon credit which is extended by a merchant under an installment contract. We shall not deal specifically with revolving charge accounts or lender credit.

In California there are two acts which pertain to vendor credit. The broader is the Retail Installment Sales Act<sup>3</sup> (Unruh Act). This Act applies to: 1) all goods bought for use primarily for personal, family or household purposes<sup>4</sup> with the exclusion of any vehicle required to be registered under the Vehicle Code,<sup>5</sup> and 2) services for other than a commercial or business use.<sup>6</sup> The narrower act is the Automobile Sales Finance Act,<sup>7</sup> also known as the Rees-Levering Act (RLA), which applies to any vehicle bought primarily for personal or family purposes.<sup>8</sup>

The purpose here is to compare the RLA with the installment sale provisions of the Unruh Act<sup>9</sup> and to determine how existing differences

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<sup>1</sup> See ASSEMBLY SUBCOMM. ON LENDING AND FISCAL AGENCIES, FINAL REPORT, 15 A. INTERIM COMM. REPORTS No. 22 (1957-59), in 2 APPENDIX TO JOUR. OF THE ASSEMBLY, Reg. Sess. (1959); ASSEMBLY INTERIM COMM. ON FINANCE AND INSOLVENCY, REPORT, 15 A. INTERIM COMM. REPORTS No. 24 (1959-61), in 2 APPENDIX TO JOUR. OF THE ASSEMBLY, Reg. Sess. (1959).

<sup>2</sup> *Id.*

<sup>3</sup> CAL. CIV. CODE §§ 1801-12.10 (West Supp. 1969-70).

<sup>4</sup> CAL. CIV. CODE § 1802.1 (West Supp. 1969-70).

<sup>5</sup> *Id.*

<sup>6</sup> CAL. CIV. CODE § 1802.2 (West Supp. 1969-70). This section further provides that the services of physicians or dentists are not included.

<sup>7</sup> CAL. CIV. CODE §§ 2981-84.4 (West Supp. 1969-70).

<sup>8</sup> CAL. CIV. CODE § 2981(j) (West Supp. 1969-70).

<sup>9</sup> It is neither the intent nor within the scope of this Comment to examine the merits of the numerous provisions of these two Acts nor to consider in detail further protections which could be advanced. The approach adopted in this Comment is not intended to create the impression that the Unruh Act provides the best possible in consumer credit protection. Doubtless, the Unruh Act suffers from many shortcomings. An exhaustive and critical analysis of the merits of the Unruh Act is to be found in Comment, *Legislative Regulations of Retail Installment Financing*, 7 U.C.L.A. L. REV. 623 (1960). Not-

will be affected by the Federal Truth in Lending Act.<sup>10</sup> Also considered will be the manner in which the proposed adoption of the Uniform Consumer Credit Code would affect present California legislation.<sup>11</sup>

Separate acts to protect the consumer in the purchase of goods and automobiles are not necessitated by consideration of legal rights, duties and formalities. Rather, the distinction is artificially predicated upon the type of item being purchased. This distinction affords the consumer less protection when purchasing an automobile than when purchasing all other chattels.

## I. COMPARISON OF THE UNRUH ACT WITH THE RLA

### A. *Scope of application*

The sale of goods<sup>12</sup> and automobiles on credit is frequently accomplished through the use of some form of an installment contract. In general, an installment contract is an agreement between a buyer and a seller in which the buyer agrees to pay by installments, over a specified period of time, the purchase price of goods or the cost of services plus a service charge. The Unruh Act refers to the type of contract covered therein, as a "retail installment contract"<sup>13</sup> whereas the RLA refers to it as a "conditional sale contract."<sup>14</sup> To the extent that each Act encompasses any installment sale contract wherein the seller has retained a security or title interest, the terms are identical. However, the RLA embraces only those transactions in which the vendor retains a security interest.<sup>15</sup> The Unruh Act, on the other hand, applies regardless of whether the vendor retains a security interest in the property sold.<sup>16</sup> This distinction is arguably insignificant because vendors seldom enter into installment sales without retaining a security interest.

### B. *Control of style and content*

Although these Acts demand disclosure of all terms and conditions in the installment contract, they can vary with respect to their requirements for content and style. The contracts must be written and if printed, must be printed in no less than eight-point type under the Unruh Act or six-

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withstanding the many amendments to the Unruh Act in the nine years since this project was published, many of the criticisms and suggestions contained therein are still valid.

<sup>10</sup> Truth in Lending Act, 15 U.S.C. §§ 1601-77 (Supp. IV, 1965-69).

<sup>11</sup> The UNIFORM CONSUMER CREDIT CODE is currently under study in the California Legislature. S. Con. Res. 22, Reg. Sess. (1969); A. Con. Res. 34, Reg. Sess. (1969).

<sup>12</sup> CAL. CIV. CODE § 1802.1 (West Supp. 1969-70) defines "goods" as tangible chattels bought for use primarily for personal, family or household purposes, with the exception of registered vehicles.

<sup>13</sup> CAL. CIV. CODE § 1802.6 (West Supp. 1969-70).

<sup>14</sup> CAL. CIV. CODE § 2981(a) (West Supp. 1969-70).

<sup>15</sup> *Id.*

<sup>16</sup> CAL. CIV. CODE § 1802.6 (West Supp. 1969-70).

point type under the RLA.<sup>17</sup> There appears to be no logical support for such an inconsistency, albeit insignificant. Both Acts provide that the installment contract shall be contained in a single document encompassing the entire agreement of the parties with respect to the costs and terms of payment, including any promissory notes or any other evidence of indebtedness.<sup>18</sup> Both Acts require all blank spaces to be filled in before obtaining the buyer's signature.<sup>19</sup> To assure compliance the contract must contain notice to the buyer: "1) Do not sign this agreement before you read it or if it contains any blank space. 2) You are entitled to a completely filled-in copy of this agreement. 3) Under the law, you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the service charge."<sup>20</sup>

The requirements for the delivery of the contracts are different.<sup>21</sup> The Unruh Act provides that the seller must deliver to the buyer, or mail to him, a legible copy of the contract which complies with the Act's provisions. Until such delivery, the buyer is obligated to pay only the cash price.<sup>22</sup> The RLA requires that an exact copy of the contract be furnished the buyer by the seller at the time the buyer and the seller sign the contract or purchase order. Furthermore, a vehicle cannot be delivered until the seller delivers a fully executed copy of the contract to the buyer.<sup>23</sup> Thus under the Unruh Act the seller can deliver the goods to the buyer without first delivering a copy of the contract to the buyer as is required by the RLA.<sup>24</sup> It appears that the contract delivery requirement of the RLA is a more certain method of protecting the consumer than the corresponding provisions of the Unruh Act. Before the consumer incurs any obligation by accepting delivery, he should be able to verify, with a copy of the contract, that the terms of the agreement are as he understands them to be.

### *C. Control over substantive terms*

While both the Unruh Act and the RLA establish maximum service or fi-

<sup>17</sup> CAL. CIV. CODE §§ 1803.1, 2982(a) (West Supp. 1969-70).

<sup>18</sup> CAL. CIV. CODE §§ 2982(a), 1803.2(a) (West Supp. 1969-70).

<sup>19</sup> CAL. CIV. CODE §§ 2982(a), 1803.4 (West Supp. 1969-70).

<sup>20</sup> CAL. CIV. CODE § 1803.2(c) (West Supp. 1969-70). CAL. CIV. CODE § 2982(a)(10) (West Supp. 1969-70) contains nearly identical language. Section 2982(a)(10) additionally requires notice to the buyer that upon default of his obligations under the agreement, the vehicle may be repossessed and he may be subject to suit and liability for the unpaid indebtedness evidenced by the agreement. This provision is inapplicable to the Unruh Act.

<sup>21</sup> However, the acknowledgement of delivery requirements are identical. CAL. CIV. CODE §§ 1803.7, 2984.3 (West Supp. 1969-70).

<sup>22</sup> CAL. CIV. CODE § 1803.7 (West Supp. 1969-70). The cash price is the price for which the goods could be purchased if the sale were a sale for cash instead of a retail installment sale. CAL. CIV. CODE § 1802.8 (West Supp. 1969-70).

<sup>23</sup> CAL. CIV. CODE § 2982(a) (West Supp. 1969-70).

<sup>24</sup> CAL. CIV. CODE §§ 1803.7, 2982(a) (West Supp. 1969-70).

nance charge rates, the rates are not the same. Under the Unruh Act the maximum service charge is set at  $5/6$  of 1% of so much of the initial unpaid balance as does not exceed \$1000 multiplied by the number of months elapsing between the date of the contract and the due date of the last installment. If the unpaid balance exceeds \$1000, then the figure is  $2/3$  of 1% of the amount over \$1000, multiplied by the number of months that the contract is scheduled to run.<sup>25</sup> The RLA provides that the amount of the finance charge cannot exceed 1% of the initial unpaid balance multiplied by the number of months that the contract is scheduled to run, or \$25, whichever is greater.<sup>26</sup> Thus if a buyer purchases furniture on an installment contract and the unpaid balance is \$3500 to be paid over a three year period, the maximum permissible service charge is \$900. If another buyer purchases an automobile on an installment contract with the same unpaid balance and payment period, the maximum permissible finance charge is \$1260. Assuming that in both instances the items purchased are sold under a similar installment contract, then justification for the variation in finance charges cannot be based on the nature of the financial arrangements. The cause for difference must be based on the fact that one case involves furniture while the other case is concerned with automobiles. For this distinction to be valid, it should be shown that the higher rates for financing automobiles are required because of higher costs and greater risks; otherwise, it seems inconsistent and inadequate to maintain different finance charges for different items where the reason for regulating such charges is purportedly identical, viz., protection of the consumer.

Both Acts allow the contracting parties to provide for the payment of a delinquency charge by the buyer on each installment in default for a period of not less than ten days.<sup>27</sup> The California Legislature, having recognized that unregulated charges for late payments can lead to oppressive practices,<sup>28</sup> has established certain maximum delinquency charges. Such charges may be collected only once on any installment regardless of the length of the period during which it remains in default.<sup>29</sup> The maximum delinquency charge

<sup>25</sup> CAL. CIV. CODE § 1805.1 (West Supp. 1969-70). Any fraction of a month in excess of more than fifteen days can be considered as one month.

<sup>26</sup> CAL. CIV. CODE § 2982(c) (West Supp. 1969-70). Any fraction of a month in excess of fifteen days can be considered as one month. In terms of an annual percentage rate,  $2/3$  of 1% is equal to an 8% per annum add-on rate or an actuarial rate of 14.77% per annum;  $5/6$  of 1% is equal to a 10% per annum add-on rate or an actuarial rate of 18.46% per annum; 1% is equal to a 12% per annum add-on rate or an actuarial rate of 22.15% per annum.

<sup>27</sup> CAL. CIV. CODE §§ 2982(c), 1803.6 (West Supp. 1969-70).

<sup>28</sup> SUBCOMM. ON LENDING AND FISCAL AGENCIES, FINAL REPORT, *supra* note 1, at 21. Examples were cited in this report in which a debtor who was six months behind in his payments could be charged 105% of the scheduled monthly payments, so that all subsequent payments which he made in the scheduled amount would apply to the late charges and the debt would never be extinguished.

<sup>29</sup> CAL. CIV. CODE §§ 2982(c), 1803.6 (West Supp. 1969-70).

under the Unruh Act is an amount not in excess of 5% of the delinquent payment or \$5 whichever is less, provided that a minimum charge of \$1 may be imposed. The RLA establishes the maximum at 5% of the amount of the delinquent installment. If the maximum delinquency charge is imposed, the automobile purchaser whose payments are in excess of \$100 will incur a greater charge than the purchaser of other goods whose payments are the same. If, however, the payments are below \$100, the automobile purchaser will incur a smaller delinquency charge.

The right of the parties to contract for the payment of the costs of collection by the buyer is much broader in the RLA than in the Unruh Act. Under the RLA it is simply stated that: "The contract may provide for reasonable collection costs and fees in the event of delinquency."<sup>30</sup> It would appear that the buyer could be required to pay any reasonable costs incurred in collecting the installment.<sup>31</sup> The Unruh Act allows the parties to contract for the payment of any actual costs of collection provided they are reasonable and only if occasioned by: 1) removal of the goods from the state without written permission of the obligee,<sup>32</sup> 2) failure of the buyer to notify the obligee of any change of residence, or 3) failure of the buyer to communicate with the obligee for a period of forty-five days after any default in making payments.<sup>33</sup> The language of this Section dictates that if the costs incurred in collection are not occasioned by any of these three conditions, the buyer cannot be bound to reimburse the obligee. Since the nature of the default and the methods of collection are the same in both cases, it is illogical to establish different criteria for the recovery of collection costs.

Inasmuch as the legislature decided that the limitations on the recovery of collection costs as provided by the Unruh Act were necessary for the protection of consumers, it is reasonable to assume that the same degree of protection should be afforded the purchaser of an automobile when the underlying purpose of both Acts is the protection of the consumer.

A third charge may be incurred by a buyer for extending or deferring payment of all or part of an installment. The Unruh Act requires an agreement for extension or deferral to be in writing before any charge can be made. Furthermore, such charge may not exceed an amount equal to 1% per month simple interest on the amount of the installment(s) extended or deferred for the period of extension or deferral.<sup>34</sup> There are no

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<sup>30</sup> CAL. CIV. CODE § 2982(c) (West Supp. 1969-70).

<sup>31</sup> There are no reported cases on this issue to date. This is understandable in light of the small amounts likely to be involved.

<sup>32</sup> The obligee is either the seller or his assignee.

<sup>33</sup> CAL. CIV. CODE § 1803.6 (West Supp. 1969-70).

<sup>34</sup> CAL. CIV. CODE § 1807.1 (West Supp. 1969-70). This Section specifies that the period of extension or deferral shall not exceed the period from the time when such payments would have been payable, to the date when such payments are made payable

comparable provisions in the RLA. Since the RLA does not prohibit extensions or deferrals, it seems proper to assume that such agreements may be made and enforced. This omission of any regulation of extension or deferral charges under the RLA is one example of how the purchaser of an automobile on an installment basis is denied the same degree of protection as a consumer making any other installment purchase.

Both Acts state that notwithstanding the provisions of any contract to the contrary, any buyer may make payment in full at any time.<sup>35</sup> In such event, the buyer must receive a refund of unearned service and finance charges.<sup>36</sup> The method of computing the amount to be refunded under the RLA is slightly more advantageous to the obligee than the method specified in the Unruh Act. Specifically, both Acts state that the refund must be at least as great a proportion of the service charge as the amount still due under the contract bears to the initial amount owed under the contract; however, the RLA provides for the purpose of this computation that \$25 will be subtracted from the actual finance charge. Notwithstanding this legislative intent, the consumer has continuously received a lesser refund by the almost universal application of the Rule of 78. Assume that a consumer has entered into an installment contract with the following terms: cash price of \$2000, finance charge of \$250, to be paid in twenty-four equal monthly installments. If, after the sixth payment, the consumer makes payment in full, his refund of the unearned finance charge will be approximately \$142.50 under the Unruh Act and \$128.25 under the RLA.<sup>37</sup> The \$25 deduction from the actual finance charge allowed under the RLA is purportedly intended to allow finance companies to recapture their out-of-pocket acquisition cost. It is paradoxical, however, that the legislature has determined that such an acquisition

under the agreement. It also provides a minimum fee of \$1.00 and allows for payment by buyer of additional insurance premiums.

<sup>35</sup> CAL. CIV. CODE §§ 2982(d), 1806.3 (West Supp. 1969-70).

<sup>36</sup> *Id.*

<sup>37</sup> The Rule of 78 is referred to in 40 OP. CAL. ATT'Y GEN. 190 (1962). This method allocates the greater part of the finance charge to the early period of the credit extension. Presumably, the courts sanction this although my research has yielded no case in point. The Rule of 78 has been subject to criticism; see Comment, *Retail Installment Sales Legislation*, 58 COLUM. L. REV. 854, 877 (1958). The sum of the digits one through twelve (the number of months in a year) equals 78. This number is used as the denominator of a fraction. The numerator of this fraction is the sum of the digits assigned to the months to be anticipated. In making this assignment, the first month of the credit extension is given the number twelve, the second eleven, and so forth. For a period of more than one year the sum of the digits is clearly more than 78—for two years it is 300. The computation of the above example is as follows:

Sum of digits 1 to 24	=	300
Sum of digits assigned to months anticipated	=	171
Unruh Act: $250 \times \frac{300}{171}$	=	\$142.50
RLA: $(250-25) \times \frac{171}{300}$	=	\$128.25

charge is not necessary in installment sales under the Unruh Act, yet allows such a charge under the RLA.<sup>38</sup>

The Unruh Act also places limitations upon the use of the balloon payment device. Any installment payment substantially in excess of prior regularly scheduled installments is a balloon payment. The Unruh Act specifically provides that if a buyer defaults on the payment of any installment which is more than double the regularly scheduled payment, he is given an absolute right to obtain a new payment schedule. Under the new schedule the installments cannot be substantially greater than the average of the preceding installments unless the buyer agrees otherwise.<sup>39</sup> This Section was undoubtedly enacted to protect the consumer, who, having made all previous payments, finds himself unable to make payment on a balloon installment. The provisions of this Section recognize and alleviate the inequities involved in a situation where a buyer defaults in making a balloon payment after having paid substantially all of the obligation. The absence of a comparable provision in the RLA is indicative of an obvious neglect of the consumer's interests in an area of recognized abuse.

In order to ensure compliance with its requirements, both Acts specifically prohibit the inclusion of certain provisions in any installment contract.<sup>40</sup> Included within such prohibited provisions are: 1) clauses requiring confession of judgment, 2) clauses wherein the buyer agrees not to assert against the seller a claim or defense arising out of a sale, and 3) clauses permitting the seller to accelerate maturity at any time and for any reason. The provisions prohibited are the same in both Acts with but two exceptions. The Unruh Act specifically provides that a buyer's waiver of any of its provisions is contrary to public policy, thereby rendering such waiver unenforceable and void.<sup>41</sup> There is no such provision in the RLA. However, in light of Civ. Code Section 3513 which states that "a law established for a public reason cannot be contravened by a private agreement," it would appear that the provision against waiver is not essential.<sup>42</sup> The other exception is more significant. The Unruh Act prohibits the inclusion in any retail installment contract of any clause by which the buyer waives his right of action against the seller or holder of the contract or agent for illegal acts committed in the

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<sup>38</sup> Any argument on the assumption that costs are greater in connection with automobile financing than with other chattels would seem to be erroneous, as it could be argued that this factor is already reflected in the higher finance charges permitted under the RLA.

<sup>39</sup> CAL. CIV. CODE § 1807.3 (West Supp. 1969-70).

<sup>40</sup> CAL. CIV. CODE §§ 2983.7, 1804.1 (West Supp. 1969-70).

<sup>41</sup> CAL. CIV. CODE § 1801.1 (West Supp. 1969-70).

<sup>42</sup> It has been held that for purposes of CAL. CIV. CODE § 3513 (West 1954), a law is enacted for a public reason if its protections extend to the public generally and promote the welfare of the general public rather than a small percentage of citizens. *Benane v. International Harvester Co.*, 142 Cal. App. 2d Supp. 874, 299 P.2d 750 (1956). It is unquestionable that the RLA conforms to these requirements.



repossession of goods.<sup>43</sup> The absence of a comparable restriction in the RLA highlights another disparity between the RLA and the Unruh Act.

*D. Regulation of the rights of the parties to an installment contract*

In many instances the vendor will sell his interest in an installment contract to a finance agency or other assignee.<sup>44</sup> It thus becomes important to determine how such a sale affects the rights of the buyer. Section 1804.2 of the Unruh Act and Section 2983.5 of the RLA deal with the buyer's rights upon assignment of the contract. Analysis and comparison of the language of these two statutes reveal their inconsistency. The RLA provision does not enlarge the rights of the buyer to the same degree as does the corresponding Section of the Unruh Act. Under Section 1804.2 of the Unruh Act an assignee is subject to *all* claims and defenses of the buyer against the seller, with but two limitations: 1) the buyer's rights may only be asserted as a defense, and 2) the assignee's liability is limited to the amount of the debt still owing.

Under the RLA the right to assert certain claims and defenses against an assignee depends upon when they arise. Because Section 2983.5 does not modify or restrict Civ. Code Section 1459 or Code Civ. Proc. Section 368,<sup>45</sup> rights which the buyer has against the seller at the time of notification of assignment appear to be assertable against the assignee at any time. As to those claims or defenses which arise subsequent to notification of assignment, they too can be asserted against the assignee but only if the assignee is informed in writing, within fifteen days of the notice of assignment, of facts giving rise to such claim or defense. If the basis for a claim or defense first appears subsequent to the fifteen day period, it cannot be asserted against the assignee. In most instances the seller will assign the contract on the same day as the sale or shortly thereafter. Thus, assuming prompt notice of assignment, any claim or defense which may arise subsequent to fifteen days after the sale could not be asserted against the assignee under the RLA, whereas, it could be asserted under the Unruh Act.

Prior to 1967, Section 1804.2<sup>46</sup> of the Unruh Act contained language nearly identical with the fifteen day notice of claim language of Section 2983.5 of the RLA. In 1967, Section 1804.2 was amended to eliminate this fifteen day notice of claim language.<sup>47</sup> This change is an acknowledgment of the inequities resulting from such a restrictive provision.

<sup>43</sup> CAL. CIV. CODE § 1804.1(e) (West Supp. 1969-70).

<sup>44</sup> CAL. CIV. CODE § 1809.1 (West Supp. 1969-70) provides that a financing agency may purchase a retail installment contract from a seller on such terms and conditions and for such price as may be mutually agreed upon.

<sup>45</sup> CAL. CIV. CODE § 1459 (West 1954) and CAL. CODE CIV. PROC. § 368 (West 1954) state that an assignment is subject to the equities and defenses existing in favor of the obligor at the time of the assignment or notice thereof.

<sup>46</sup> Ch. 201, [1959] Cal. Stat. 2098.

<sup>47</sup> Ch. 1294, [1967] Cal. Stat. 3098.

These Acts allow for the retention of a security interest and for the right of the seller to repossess. Additionally, both Acts establish several limitations and requirements with regard to repossession. Section 1812.2 of the Unruh Act provides that within ten days after repossessing, the seller must give notice to the buyer of his intention to sell the goods at public sale or give notice of his intention to retain the goods in satisfaction of the balance due. This notice must inform the buyer of how much must be paid in order to redeem the goods. Furthermore, the buyer has an absolute right to redeem within ten days of the notice if he pays the proper amount. If the seller intends to sell the goods, then the buyer has the right to redeem at any time prior to the actual sale.

Section 2983.2 of the RLA requires the seller to give the buyer at least ten days written notice of his intent to sell the repossessed vehicle. He must also inform the buyer of his right to redeem the vehicle and the total amount required to do so. In contrast to the Unruh Act, the RLA does not specifically prescribe the period after repossession in which notice of intent to sell must be given. However, Section 2983.2 bars the seller from recovering a deficiency judgment if he fails to give such notice within sixty days of repossession. The practical effect of this, in light of the high incidence of deficiencies after sale, is to compel the seller to give notice within sixty days of repossession. Hence, under the Unruh Act notice of intent to sell or retain the goods must be given within ten days of repossession, whereas the RLA allows the seller sixty days to give notice. From the language of Section 2983.2 it appears that the seller need not notify the buyer of his intent to keep the vehicle in satisfaction of the balance due; furthermore, it appears that under this section the buyer does not have a right of redemption if the seller decides not to resell the vehicle. These variations between the two Acts regarding requirements of notice and right of redemption are arbitrary and can inflict harsh injustices upon the automobile purchaser, injustices which are prohibited under the Unruh Act. Notwithstanding the possible contention that in nearly all instances the reposessor of an automobile will resell the vehicle, there is, nonetheless, a possibility that there will be a retention rather than a resale; to this extent, the RLA is deficient in its purported attempt to protect the consumer. This is especially poignant in those instances where the buyer has paid a substantial amount of the contract balance.

Closely related to the right of repossession and resale is the right of the seller to recover a deficiency judgment where the proceeds of the resale are insufficient to cover: 1) the expense of the resale, 2) the expense of the retaking, repairing and storing of the goods, and 3) the satisfaction of the balance due under the contract. Section 1812.5 of the Unruh Act explicitly precludes the obligee from ever recovering a deficiency judgment. This provision is manifestly indicative of the legislature's determination that such a prohibition is essential to the adequate protection of the consumer.

Once again, a provision which has been deemed essential to consumer protection has been omitted from the RLA. In fact, the RLA specifically provides that if, within sixty days after repossession, the seller notifies the buyer of his intent to resell, then the seller or other obligee may recover a deficiency judgment.<sup>48</sup> Inasmuch as the stated objectives of the two acts are identical, this glaring inconsistency seems completely without justification. If the buyer of furniture or appliances is to be protected against deficiency judgments, why not afford the buyer of an automobile the same degree of protection? The nature of the financial arrangements is often identical and the amount of money at stake in the first instance is often as great as is involved in the purchase of an automobile.

In a further effort to protect the defaulting buyer, the legislature, in the Unruh Act, has provided that in addition to exemptions provided elsewhere, the wages of a defendant are exempt from attachment for a period of sixty days from the date of default.<sup>49</sup> Again, there is no comparable provision in the RLA, but this inconsistency may be resolved under *Sniadach v. Family Finance Corp.*<sup>50</sup> In *Sniadach*, the Court held unconstitutional, as a denial of due process under the Fourteenth Amendment, a Wisconsin statute authorizing prejudgment garnishment of wages.

#### *E. Sanctions imposed for violation*

Both Acts establish different criteria for the correction of violations.<sup>51</sup> They provide that correction shall be made by delivering a properly revised copy of the contract to the buyer, that any amount improperly collected shall be credited against the indebtedness, and that any correction which increases the amount owed by the buyer is not effective unless the buyer concurs in writing. The seller's right to correct violations is more narrow under the Unruh Act. Whereas willful violations are deemed incorrigible under the Unruh Act, the RLA allows for corrections only if they appear on the face of the contract and are effected within thirty days of the execution of the contract. Moreover, the language of the Unruh Act indicates that corrections of non-willful violations must be made, if at all, within thirty days of the execution of the original contract. The RLA prescribes no time limitation for the correction of nonwillful violations.

Paradoxically the RLA imposes harsher civil sanctions upon violators of its provisions than does the Unruh Act. The application and degree

<sup>48</sup> CAL. CIV. CODE § 2983.2 (West Supp. 1969-70). Additional prerequisites to the recovery of a deficiency judgment are notice to the buyer that he is subject to suit and liability for any deficiency which exists after resale and an itemization of all amounts due including any credits for unearned finance charges or cancelled insurance.

<sup>49</sup> CAL. CIV. CODE § 1812.1 (West Supp. 1969-70).

<sup>50</sup> 395 U.S. 337 (1969).

<sup>51</sup> CAL. CIV. CODE §§ 2984, 1812.8 (West Supp. 1969-70).

of the civil penalties imposed by the RLA is rather complex.<sup>52</sup> If the seller, except as a result of a bona fide error in computation, violates either the provisions regarding disclosure or maximum charges, the contract will, at the election of the buyer, be unenforceable by the seller. The buyer may, with reasonable diligence, elect to rescind the contract and, upon return of the vehicle, may recover all payments made pursuant to the contract, including the value of any trade-in as it appears on the conditional sale contract, or the fair market value at the time the contract was made, whichever is greater. If the seller has assigned the contract and if the assignee has knowledge of the violation, then the buyer may still elect to rescind and return the vehicle and recover from the seller all payments made to the seller and the assignee.<sup>53</sup> The possibility that the seller will have to return all amounts paid by the buyer is a compelling reason for compliance, especially when in most instances the seller assigns the contract at a discounted rate to a finance company. However, if the assignee does not have actual knowledge of the violation by the seller of the disclosure or maximum charges regulations, the contract will be valid and enforceable, although the buyer will be excused from payment of the unpaid finance charge.<sup>54</sup>

If a seller or assignee, except as a result of a bona fide error, violates the prepayment and refund provisions, "the buyer may recover from such person three times the amount of any finance charge paid to that person."<sup>55</sup> By variegating the penalties for different violations, the RLA has rendered certain of its provisions more coercive than others.

If a seller fails to comply with the provisions of the Unruh Act, he or anyone who acquires the contract from him with knowledge of the noncompliance is barred from recovery of any charges in excess of the cash price, and the buyer can recover all of such charges which he has paid.<sup>56</sup> Thus if the seller has not assigned the contract, he will be subject to this penalty even if the violation was an innocent error, whereas the assignee will be subject to the sanction only if he had knowledge of the noncompliance.

## II. EFFECT OF THE FTLA AND UCCC ON RECONCILING THE DIFFERENCES BETWEEN THE UNRUH ACT AND THE RLA

In an attempt to arrest the mounting abuses in consumer credit throughout the nation, Congress recently enacted the Consumer Credit Protection Act

<sup>52</sup> CAL. CIV. CODE §§ 2983, 2983.1 (West Supp. 1969-70).

<sup>53</sup> If the seller goes out of business can the buyer recover from an assignee of the seller? This question has not been resolved.

<sup>54</sup> It has been held that an assignee cannot claim that he has no notice of violation where the violation appears on the face of the contract in the form of a failure to describe and itemize certain amounts. *G.M.A.C. v. Kyle*, 54 Cal. 2d 101, 108, 4 Cal. Rptr. 496, 500 (1960).

<sup>55</sup> CAL. CIV. CODE § 2983.1 (West Supp. 1969-70).

<sup>56</sup> CAL. CIV. CODE § 1812.7 (West Supp. 1969-70).

(CCPA).<sup>57</sup> This Act, generally referred to as the Federal Truth in Lending Act (FTLA), became effective, in part, on July 1, 1969 and will become fully effective in July 1971. All businesses and financial institutions involved in consumer credit are covered by the FTLA. The Act is specifically directed toward securing a "meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."<sup>58</sup> The scope of the FTLA is not so broad as that of the two California Acts because the FTLA attempts neither to regulate maximum finance charges nor to define the rights and duties of the parties. Because of this emphasis on disclosure—a subject about which the provisions of the RLA and Unruh Act are nearly identical—the FTLA will have no effect upon reconciling the differences between the Unruh Act and the RLA.

There are, however, two provisions in the FTLA, not in the area of disclosure, which will augment consumer credit protection in California. A section of the FTLA establishes a limited right of rescission by the obligor in any credit transaction in which a security interest is retained in the obligor's residence.<sup>59</sup> With respect to garnishment of wages, the FTLA establishes maximum amounts which can be garnished.<sup>60</sup> This limitation is more stringent than the California limitations on garnishment.<sup>61</sup> Furthermore, another section prohibits employers from discharging any employee because his wages have been subjected to garnishment for any one indebtedness.<sup>62</sup> It should be noted that these sections, as they relate to prejudgment garnishment, would appear to have been superseded by *Sniadach v. Family Finance Corp.*<sup>63</sup>

The National Conference of Commissioners on Uniform State Laws has recently promulgated a Uniform Consumer Credit Code (UCCC). The purpose of this Code is to establish a comprehensive statute regulating virtually all aspects of consumer credit. The UCCC was drafted with the intent of incorporating the FTLA into its provisions.<sup>64</sup> Consideration of the effect which the UCCC has upon reconciliation of the differences between the Unruh Act and the RLA is extremely pertinent as the California legislature is currently studying the UCCC for possible adoption.<sup>65</sup> The UCCC applies

<sup>57</sup> Truth in Lending Act, 15 U.S.C. §§ 1601 *et. seq.* (Supp. IV, 1965-69).

<sup>58</sup> *Id.* at § 1601.

<sup>59</sup> *Id.* at § 1635.

<sup>60</sup> *Id.* at § 1673.

<sup>61</sup> CAL. CODE CIV. PROC. § 543 (West 1954).

<sup>62</sup> Truth in Lending Act, 15 U.S.C. § 1674 (Supp. IV, 1965-69).

<sup>63</sup> 395 U.S. 337 (1969).

<sup>64</sup> See Jordan & Warren, *Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387 (1968).

<sup>65</sup> Concurrent resolutions have been introduced in the California Senate and Assembly calling for study of the Uniform Consumer Credit Code, S. Con. Res. 22, Reg. Sess. (1969); A. Con. Res. 34, Reg. Sess. (1969). The Uniform Consumer Credit Code has been adopted in Utah and Oklahoma. UTAH CODE ANN., Title 70B

to the purchase of all consumer goods on credit with no distinctions drawn between the purchase of automobiles and other goods and services.

### *A. Scope of application*

The UCCC is broader in scope than the RLA and parallels the scope of the Unruh Act. As indicated previously, the RLA applies only to installment sales in which the seller retains a security interest, while the Unruh Act is not so limited. UCCC Article 2 relating to Credit Sales would apply to any consumer credit sale where the debt is payable in installments or a credit service charge is made and the amount financed does not exceed \$25,000 (except in the case of a sale of real estate); thus the UCCC, as does the Unruh Act, would apply regardless of whether the seller retained a security interest.

### *B. Control of style and content*

The approach of the RLA to the issue of delivery of the contract appears to be adopted by the UCCC. There is no specific language in the UCCC which is comparable to the relevant language of Section 2982(a) of the RLA; however, UCCC Section 2.302(2)(b) can be construed as requiring that the contract must be delivered to the buyer at the time that it is signed. The UCCC does not state, as does the RLA, that the seller cannot make delivery until the buyer receives a copy of the contract.

### *C. Control over substantive terms*

The UCCC, in contrast to the varying rates established by the Unruh Act and RLA, provides uniform maximum finance charges for all goods. However, as the rates specified in the UCCC are substantially greater than those which are currently permitted in California, it is unlikely that the UCCC rate structure would be enacted in California.<sup>66</sup> Nevertheless, the concept of a uniform reasonable maximum rate structure for all goods and services, including automobiles, is entirely consistent with the goal of adequate consumer protection and, as indicated previously, is highly desirable.

§§ 70B-1-101 to 70B-9-103 (Smith Supp. 1969); 14A OKLA. STATS. ANN. §§ 1-101 to 9-103 (West Supp. 1969-70).

<sup>66</sup> "The credit service charge . . . on credit sale other than pursuant to a revolving charge account . . . may not exceed the equivalent of the greater of either of the following:

- (a) the total of
    - (i) 36 per cent per year on that part of the unpaid balances of the amount financed which is \$300 or less;
    - (ii) 21 per cent per year on that part of the unpaid balances of the amount financed which is more than \$300 but does not exceed \$1,000; and
    - (iii) 15 per cent per year on that part of the unpaid balances of the amount financed which is more than \$1,000; or
  - (b) 18 per cent per year on the unpaid balances of the amount financed.
- UNIFORM CONSUMER CREDIT CODE § 2.201.

The UCCC sets a maximum delinquency charge not to exceed the greater of 5% of the unpaid installment up to a maximum of \$5, or the deferral charge that would be permitted to defer the unpaid amount of the installment for the period that it is delinquent.<sup>67</sup> Both California Acts specify a maximum rate of 5%, with the Unruh Act also setting a \$5 maximum. This UCCC Section is centered between the provisions of the two California Acts.

The UCCC does not contain any provision regulating the payment of the collection costs by the buyer.

With the exception of a different rate, the UCCC's regulation of deferral charges is quite similar to the deferral provision of the Unruh Act.<sup>68</sup>

The UCCC provides the same method for computing the refund of unearned service charges as does the Unruh Act.<sup>69</sup> Thus the variation in computational method existing between the Unruh Act and the RLA would be resolved by the UCCC along the lines of the Unruh Act. Also, while both California Acts give the buyer an absolute right to make prepayment, there is no comparable provision in the UCCC.

The absence of any provision in the RLA relating to balloon payments would be resolved by the UCCC, as Section 2.405 is substantially the same as the Unruh Act provision on balloon payments.

#### *D. Regulation of the rights of the parties to an installment contract*

Regarding the rights of a buyer against an assignee, the UCCC has adopted two alternative sections. The language of UCCC Section 2.404 (Alternative A) is nearly identical with the language of Section 1804.2 of the Unruh Act concerning buyer's rights against the assignee. UCCC Section 2.404 (Alternative B) takes the same approach as Section 2983.5 of the RLA. If either alternative is adopted, the inconsistencies in current California law would be eliminated. Adoption of Alternative A would more closely conform to the current desire to provide adequate consumer protection as evidenced by the 1967 amendment of Section 1804.2 of the Unruh Act to its current language.

The distinctions which exist between the two California Acts on repossession and right of redemption would not be affected by the UCCC because it contains no provisions relating to these rights.

As noted, the two California Acts differ with regard to the obligee's right to recover a deficiency judgment. The provisions of the UCCC represent something of a compromise between the outright denial of such a

<sup>67</sup> UNIFORM CONSUMER CREDIT CODE § 2.203(1).

<sup>68</sup> *Id.* at § 2.204; CAL. CIV. CODE § 1807.1 (West Supp. 1969-70).

<sup>69</sup> UNIFORM CONSUMER CREDIT CODE § 2.210; CAL. CIV. CODE § 1806.3 (West Supp. 1969-70).

right in the Unruh Act and the unrestricted acceptance of such a right in the RLA. The UCCC confines the obligee's right to a deficiency judgment to instances where the cash price of the goods repossessed is over \$1000.<sup>70</sup>

The garnishment sections of the UCCC are more restrictive than those found in the Unruh Act. Section 5.104 states that a debtor's unpaid earnings cannot be attached prior to entry of judgment in an action against the debtor.<sup>71</sup> Furthermore, Section 5.105 places a restriction on the amount of earnings which can be attached. This section is more restrictive than the comparable section of the FTLA.<sup>72</sup> Perhaps the most significant addition to the restrictions on garnishment is contained in Section 5.106 which prohibits an employer from discharging an employee for the reason that a creditor of the employee has attached his wages, regardless of the number of times that such attachment occurs.<sup>73</sup>

Incorporated in the UCCC are a number of sections which provide for a "cooling-off period" with respect to home solicitations.<sup>74</sup> Section 2.502 provides that, until midnight of the third business day after an agreement has been signed, the buyer has the right to cancel any home solicitation credit sale of consumer credit goods. It is the intent to neutralize high pressure sales tactics which has prompted this provision.<sup>75</sup> Door-to-door salesmen are often able to induce consumers to make hasty and ill-advised purchases.<sup>76</sup> If, after a salesman has departed, the buyer "cools off" and realizes that he has been pressured into an unwise purchase, the UCCC allows him to cancel the sale. If this provision of the UCCC is enacted, it would add a new dimension to the protections afforded by the Unruh Act. Indeed, similar cooling-off period legislation has on several occasions been proposed in the California Legislature.<sup>77</sup>

#### *E. Sanctions imposed for violations*

The UCCC and the RLA vary the penalties for the violation of different sections. Where the buyer has been charged in excess of permissible rates, he has a right to recover a refund from the seller or his assignee in the

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<sup>70</sup> UNIFORM CONSUMER CREDIT CODE § 5.103.

<sup>71</sup> This section appears to be in harmony with *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

<sup>72</sup> Truth in Lending Act, 15 U.S.C. § 1673 (Supp. IV, 1965-69).

<sup>73</sup> This provision is more forceful than Truth in Lending Act, 15 U.S.C. § 1674 (Supp. IV, 1965-69).

<sup>74</sup> UNIFORM CONSUMER CREDIT CODE §§ 2.501-05.

<sup>75</sup> *Id.* at § 2.501, Comment.

<sup>76</sup> See Sher, *The "Cooling-Off" Period in Door-to-Door Sales*, 15 U.C.L.A. L. REV. 717 (1968).

<sup>77</sup> A.B. 209 (Reg. Sess. 1967), A.B. 213 (Reg. Sess. 1968). "Cooling-off" period legislation has been passed in Massachusetts. MASS. GEN. LAWS ANN. ch. 255D, § 14A (Supp. 1969).



form of a deduction from the outstanding indebtedness.<sup>78</sup> This penalty is less severe than the penalties imposed by the two California Acts for the same violation.<sup>79</sup> Where there is a violation of the disclosure provisions of the UCCC, the violator is liable to the buyer in an amount equal to twice the amount of the service charge, but not less than \$100 or more than \$1,000 plus the costs of the action and reasonable attorney's fees.<sup>80</sup> If the creditor corrects the violation of the disclosure provisions within fifteen days after discovering an error, the creditor will incur no liability for the violation.<sup>81</sup> The language of this Section seemingly prohibits the correction of an intentional violation because the seller must "discover" the error. Where the creditor can show that the violation was unintentional and resulted from a bona fide error, he will incur no liability for failure to make full disclosure. The civil penalty provisions of the UCCC are somewhat similar to the provisions of both California Acts. While adoption of the UCCC's penalty provisions would achieve uniformity, it is questionable whether the consumer would be as adequately protected through private remedies as he is under California law.

There is, however, a consumer oriented penalty and enforcement section in the UCCC which requires the establishment of an Administrator with power, *inter alia*, to "receive and act on complaints, take action designed to obtain voluntary compliance with this Act, or commence proceedings on his own initiative . . . ."<sup>82</sup>

Section 6.108 confers upon the Administrator authority to issue cease and desist orders against persons who violate provisions of the Act.<sup>83</sup> Such orders are not enforceable until the Administrator secures a judicial enforcement order. However, unless the alleged violator files a petition for judicial review of the cease and desist order within thirty days after receipt thereof, it becomes final and the Administrator may obtain enforcement without having to support his findings with substantial evidence. Alternatively, Section 6.110 authorizes the administrator to seek injunctions to restrain violations of the Act.

In Section 6.111 the Administrator is empowered to bring civil actions to restrain a creditor or person acting on his behalf from making or enforcing unconscionable contracts, from unconscionably inducing consumers to enter into credit transactions or from fraudulently or unconscionably collecting consumer credit debts. The following factors are to be considered in applying

<sup>78</sup> UNIFORM CONSUMER CREDIT CODE § 5.202.

<sup>79</sup> CAL. CIV. CODE §§ 2983.1, 1812.7 (West Supp. 1969-70).

<sup>80</sup> UNIFORM CONSUMER CREDIT CODE § 5.203(1).

<sup>81</sup> *Id.* at § 5.203(2).

<sup>82</sup> *Id.* at § 6.104(1)(a).

<sup>83</sup> Such orders are not available for violations of the unconscionability or fraudulent conduct rules set out in UNIFORM CONSUMER CREDIT CODE § 6.111. This section prescribed its own means of enforcement.

this section:

(3) . . . :

- (a) belief by the creditor at the time consumer credit sales . . . are made that there was no reasonable probability of payment in full . . . ;
- (b) . . . knowledge by the seller . . . at the time of the sale . . . of the inability of the buyer . . . to receive substantial benefits from the property or services sold . . . ;
- (c) . . . gross disparity between the price of the property or services sold . . . and the value of the property or services measured by the price at which similar property or services are readily obtainable in credit transactions by like buyers . . . ;
- (d) . . . ; and
- (e) the fact that the respondent has knowingly taken advantage of the inability of the debtor reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.<sup>84</sup>

The Administrator is enabled under Section 6.111 to deal with new patterns of fraudulent or unconscionable conduct and to impose flexible remedies for halting reprehensible creditor practices.<sup>85</sup> This Section is potentially responsive to the needs of consumers. Of course, realization of its full potential would require an aggressive Administrator.

When a creditor makes or collects charges in excess of those permitted in the Act, Section 6.113(1) empowers the Administrator to bring a civil action to refund the amount of the excess. A penalty may be imposed if such excess charge is a deliberate violation or made in reckless disregard of the Act, or if the creditor has refused to make a refund within a reasonable time after demand by the debtor or Administrator. Such penalty cannot exceed the greater of either the amount of the credit service charge or ten times the excess charge. Since individual excess charges are usually relatively small amounts, this section enables the Administrator to file such actions on behalf of more than one debtor.

Section 6.113(2) provides that, except for making unconscionable agreements or engaging in a course of fraudulent or unconscionable conduct, the Administrator may bring a civil action to impose a civil penalty of up to \$5,000 upon a creditor who has engaged in a course of repeated and willful violations of the Act.

### III. CONCLUSION

Full and adequate protection of the consumer in all his encounters with installment sellers should be sought. In California, in the area of vendor credit, the purchaser of a motor vehicle receives less protection than the purchaser of all other goods and services. The FTLA has no impact upon the need to reconcile the RLA with the Unruh Act. Adoption of the UCCC,

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<sup>84</sup> UNIFORM CONSUMER CREDIT CODE § 6.111.

<sup>85</sup> *Id.* at Comment 2.

which would apply uniformly to all consumer credit transactions, necessarily supersedes the RLA and the Unruh Act. An overall assessment of the UCCC reveals it as generally less protective of the interests of vendor credit purchasers than the Unruh Act.

While the concept of uniformity in the area of consumer credit is logical and beneficial, the California Legislature should consider alternatives to the adoption of the UCCC. One such alternative is to expand the Unruh Act to include motor vehicles and to repeal the RLA. Those provisions of the RLA which are appropriate to the installment purchasing of motor vehicles and those which are more promotive of consumer interests than corresponding sections of the Unruh Act could be integrated into the Unruh Act. Additionally, to supplement consumer credit protection, the Unruh Act should be amended to include provisions for a cooling-off period and for a scheme of public enforcement by an Administrator similar to such provisions contained in the UCCC.

By expanding the Unruh Act to cover all vendor credit and enacting these two provisions of the UCCC, both greater uniformity and better consumer protection could be attained in California.

*Richard D. Sommers*

## INSTALLMENT SALE TRANSACTION

Amount Financed \$3500 Period 36 Months		Balloon Payment Due the Last Month: \$300	
UNRUH ACT		RLA	UCCC
Delivery of Contract Requirements	Goods may be delivered before buyer has contract but buyer liable only for cash price.	Contract must be delivered before vehicle can be delivered.	See p. 20
Finance Charge	\$900	\$1,260 This is 40% more than permitted by Unruh.	\$1,180 This is 31% more than permitted by Unruh.
To illustrate the higher finance charge possible under UCCC assume amount financed is \$600 and period is 12 months.	\$60	\$72 This is 20% more than permitted by Unruh.	\$103.89 This is 73% more than permitted by Unruh.
Delinquency Charge Assume 3 Delinquent Payments	\$15	\$18.57 This is 22% more than permitted by Unruh.	\$18.57 This is 22% more than permitted by Unruh.
Deferral Charge Assume 1 Payment Deferred 24 Months	\$27.33	\$44.59 This is 63% more than permitted by Unruh.	\$44.59 This is 63% more than permitted by Unruh.
Default in Balloon Payment	Absolute right to a new repayment schedule.	No right to a new repayment schedule.	Absolute right to a new repayment schedule.
Repossession and Resale	See p. 141-42	See p. 141-42	
Deficiency Judgment	Prohibited	Can recover, if within 30 days of repossession buyer is notified of intent to sell.	Can be recovered if cash price of goods repossessed is over \$1000.
Total Cost to Buyer	\$4,442.33	If no default in balloon payment, cost would be \$4,823.16. With default in balloon payment, total expenditure would be only \$4,523.16; however, purchaser would lose possession of the vehicle and be subject to a deficiency judgment.	\$4,743.16